

The European Competition Network (ECN): It Does Actually Work Well



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National competition authorities and national courts concurrently apply European competition rules with the European Commission focusing on the most severe infringements. The European Competition Network has been established with the aim of assisting the coherent application of competition rules across the EU. This is a network of public authorities consisting of the European Commission and the national competition authorities and functions as a forum for discussion and cooperation. The European Institute of Public Administration undertook a study on the functioning of the European Competition Network. This paper presents the results of that study.

Introduction

During the last decade, European competition policy has undergone major changes with the aim of contributing to the achievement of its main objective as enshrined in Article 3(g) TEC, that a system ensuring undistorted competition should be included in Community activities. As part of these changes, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 TEC (hereinafter the "Regulation") was adopted.¹ This Regulation came into force on 1 May 2004. The reason for its adoption was that, given the EC's enlargement and the continuous globalisation of the economy, a centralised authorisation system managed by the European Commission (hereinafter "the Commission") using Regulation 17/62 would no longer ensure effective application of competition rules and thus the completion of the single market.²

In this regard the reform contained three main objectives. The first of these is rigorous enforcement of competition law by concentrating on the most important cases involving a real EC interest. The second main objective is effective decentralisation, with the Commission, the National Competition Authorities (hereinafter "NCAs") of the Member States and the national courts having concurrent powers to apply EC competition rules. Each of the 27 NCAs is now fully empowered to apply all elements of the above rules, including the exemption provisions of Article 81(3) TEC, a power previously reserved only for the Commission. The third main objective is simplification of control procedures, with the abolition of the notification and authorisation system.

The European Competition Network (hereinafter "ECN"), which was introduced by the Regulation, is the implementing instrument of the modernisation of the EU's antitrust law enforcement, that is the enforcement of Articles 81 and 82 TEC. Together, the NCAs and the Commission form a network of public authorities which constitutes a forum for discussion and cooperation in the application and enforcement of EC competition policy; this network is called the ECN. To this end the Commission has published a Notice specifying the principles applicable to this cooperation within the ECN.³

The aims of this paper are to provide a brief analysis of the functioning of the ECN, to present the results of a study undertaken by the European Institute of Public Administration (hereinafter "EIPA") in this context, and to conclude on how successful its operation has been.

ECN: the Background

The Notice provides that the ECN must ensure an efficient division of work, mutual assistance between NCAs and an effective and consistent application of EC competition rules.

Division of Work

As the new system is governed by rules of parallel competences, an optimal division of work is required. The Notice clarifies that an NCA is well placed to deal with a case if three conditions are met:

1. the actions of the parties have substantial effects for the territory in which the authority is based;
2. the authority can effectively bring to an end the entire infringement;
3. the authority can effectively gather the evidence required to prove the infringement.

It is important to point out in this context that, although the ECN provides the framework for efficient work sharing between NCAs by means of the exchange of information mechanism, it does not decide on the division of the work, nor do the Commission or the NCAs themselves. In practice NCAs start, conduct and possibly conclude the proceedings in accordance with their own responsibility.

Mutual Assistance

On the basis of Article 11(3) of the Regulation, any NCA acting under Articles 81 or 82 TEC must inform the Commission before or just after commencing its first formal investigative measure. The Commission has also accepted an equivalent obligation to inform NCAs under Article 11(2) of the Regulation. NCAs can furthermore assist each other in various fact-finding measures by means of a standard form containing limited details of the case concerned, such as the authority dealing with the case, the product, the territories and parties concerned, the alleged infringement, the suspected duration of the infringement and the origin of the case.

Article 12 of the Regulation provides for the exchange of information between the Commission and the NCAs and between the NCAs themselves.

Effective and Consistent Application of EC Competition Rules

Under Article 11(4) of the Regulation, an NCA must inform the Commission no later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation. This information may also be made available to the other members of the ECN.

Under Article 11(6) of the Regulation, the Commission can initiate formal proceedings, thus relieving the respective NCA of its competence to apply Articles 81 and 82 TEC. If the NCA is already acting on a case, then the Commission shall only initiate proceedings after consulting with that NCA.

As stipulated in the Notice, the Commission will in principle only apply Article 11(6) of the Regulation if:

- ECN members envisage conflicting decisions in the same case;
- ECN members envisage a decision which is obviously in conflict with consolidated case law;
- ECN member(s) is (are) unduly drawing out proceedings in the case;
- There is a need to adopt a Commission decision to develop Community competition policy;
- The NCA(s) concerned do not object.

The reason behind Article 11(6) of the Regulation and the special responsibility granted to the Commission is the fact that in the current system, only Commission decisions can be challenged before Community courts, and not the decisions of the NCAs. Therefore, entrusting the Commission with powers to develop Community competition policies is the only way to involve the Community courts directly in the judicial review of such developments and thus ensure the effective and consistent application of EC competition rules. Otherwise, where the case is not dealt with by the Commission, it is only possible to reach Community courts if national courts, which usually do not want to slow proceedings, are willing to request a preliminary ruling⁴.

ECN: the EIPA Study

The Commission's initiative to modernise the antitrust rules, the subsequent Council Regulation 1/2003 and the functioning of the ECN have attracted numerous comments and analyses, as well as heavy criticism in the literature.

It has been stated that with the Regulation "the Commission has orchestrated a political masterstroke. It has given the impression of radical reform to the Member States by abolishing the notification procedure and offered decentralisation provisions [...] which in no way undermine its central role [...] DG Competition has in fact managed to centralise European competition law more than under Regulation 17".⁵

As far as the creation of the ECN is concerned, the criticism is directed at the under-resourced NCAs, the systemic problems of sharing confidential information across the EU, the "case handling" question of who will take the lead in multi-jurisdictional cases, the greater degree of uncertainty for companies as they lose the simplicity of centralised clearance from the Commission and the issue of accountability within the ECN.⁶

The analysis below will attempt to provide answers to a number of issues that have been raised in the literature. This analysis is based among other things on a study undertaken by EIPA on the basis of which a questionnaire was prepared and sent out in order to solicit the views of the NCAs as regards the functioning of their own organisations and of the ECN. The questionnaire was based upon a number of principles that evidently govern the effective operation of networks:

- Does the ECN (and its secretariat) have adequate resources?
- How are decisions made within the ECN? Are decisions made on the basis of qualified majority?
- What ideally should be the role of the ECN vis-à-vis its members? Could tasks be identified that maybe assigned to the network, over which ECN should have clear responsibility for their completion, and in collaboration with members?
- Is there any research programme defined and carried out by the ECN?
- How does the ECN facilitate the establishment of a system for the bilateral exchange of information and experiences on regulatory problems?

- How does the ECN facilitate the establishment of a system for collecting information on the state and methods of application of common rules by national authorities?
- How does the ECN help members to identify best practices on issues of common concern?
- To what extent may national variations be justified by the specific nature of national conditions?

Provide the ECN (and its secretariat) with more resources?

The ECN does not have its own secretariat. DG Competition has five to six members of staff involved in the network. It has not yet been considered whether the establishment of a secretariat would be necessary, given that the Regulation itself provides the legal basis for NCAs to exchange information and discuss implementation and interpretation issues.

Introduce decision-making procedures based on qualified majority?

It was found that this is irrelevant in the context of the ECN. The network neither decides which cases should be pursued nor which authority/ies would be well placed to carry out the investigation. Discussions within working groups and sub-groups are based on consensus; however, the members of the ECN are not obliged to comply with the results achieved, as participation in those groups does not create any legal rights. Nevertheless, they are obliged to make their best efforts to ensure compliance, whereas any deviation is subject to peer pressures.

Identify tasks which could be assigned to the ECN for which the ECN should have clear responsibility for their completion, and in collaboration with members?

Under the ECN, working groups for horizontal issues and sub-groups for sectoral issues have been established. The majority of the NCAs questioned replied that the ECN is carefully constructed and appropriately defined to ensure the effective and consistent application and implementation of EC competition rules. A minority criticised the establishment of so many working groups and subgroups, as active participation in all forums was perceived as very resource-consuming and difficult, particularly for small NCAs.

Define a research programme to be carried out by the ECN?

Ten out of 17 NCAs replied that they do not conduct research on competition policy and law issues. Research is carried out at ECN level through the working groups and subgroups but no particular research plan is defined.

Establish a system for the bilateral exchange of information and experiences on regulatory problems?

The ECN provides a valuable forum for discussion and cooperation among the NCAs. NCAs can now learn from each others' experiences, coordinate investigations, help each other with investigations, exchange evidence and information and discuss issues of common interest.

Thanks to the ECN's interactive access and the electronic database containing details from the standard forms, NCAs can also be informed of other authorities' main contact persons. The ECN thus makes it possible for NCAs to identify among themselves who does what. It is not therefore a simple electronic connection; it is rather an effective daily working tool, an open network that allows, on the one hand, an exchange of confidential information and, on the other hand, easy interaction between the members of the network. Consequently, cooperation can occur even in the absence of formal procedures or formal requirements.

Establish a system for collecting information on the state and methods of application of common rules by national authorities?

Article 11(3) of the Regulation creates an obligation for all NCAs to inform the Commission before or without delay after commencing the first formal investigative measure in all cases involving the application of Article 81 and 82 TEC. This information may be shared with other NCAs.

Generally, the most important element that has come from the creation of the ECN is a "can do" attitude, and the way it has been embraced by all Member States and the willingness shown by all to attempt to accommodate each other and to share information when necessary

"In practice, the obligation to inform about new cases is complied with by uploading the relevant information in a common case-management system. This system was developed by the DG COMP IT-team and has been operational from 1 May 2004.⁸ The system is secured against unauthorised access and access rights are restricted to case-handlers and other authorised personnel of the competition authorities. The IT-system foresees the possibility to insert standardised information on, for instance, the parties, the products, the territories, the alleged infringement, its suspected duration, the contact details of the case handlers in charge etc. [...]"⁹

All NCAs that replied to our questionnaire share the same view, which is that the ECN helps them to improve their enforcement capabilities in relation to competition rules and, at the same time, to ensure the coherence of the application of these rules.

Identify best practices on issues of common concern?

The legal framework for the establishment of the ECN does not provide for the network to exercise any decision powers in order to achieve harmonisation of rules. The ECN however, as its members report, can contribute to such harmonisation by adopting, through its sectoral subgroups and horizontal working groups, best practices on particular issues which could provide guidance to NCAs in relation to their enforcement activities or to their national parliaments in relation to reforming respective legislation.

There are currently numerous subgroups dealing with particular sectors of the economy (e.g. banking, securities, energy, insurance, food, pharmaceuticals, professional services, healthcare, environment, motor vehicles, telecommunications, media, IT & information & communication, abuse of dominant position, Competition Chief Economist and railways). These groups meet at least twice a year and otherwise exchange information via a common intranet application.

There is also a small number of working groups that deal with horizontal issues pertaining to national laws on procedures and sanctions¹⁰. It is important to note that the decision

with provisions on mutual assistance and close cooperation, it does not, on the other hand, harmonise national rules on procedures and sanctions, which remain heterogeneous.

The rights of complainants (e.g. right to access a file or attend an oral hearing, right to reply to a statement of objections or rights relating to the treatment of confidential information) are therefore different from one system to another. In some jurisdictions, such as the Irish legal system, it would be extremely difficult to harmonise procedures and sanctions given that under that system, the fines imposed on undertakings for breach of competition rules are at the discretion of the national courts.

However, irrespective of which NCA deals with a case, the application of competition law must be the same. Article 3(1) of the Regulation obliges NCAs to apply EC law to agreements and practices which are capable of affecting trade between Member States. Article 3(2) of the Regulation prevents them from reaching a different conclusion when they apply national laws to restrictive agreements. The only scope for divergence, which remains after the modernisation, is in the field of unilateral behaviour, which may be treated more severely under national law than under Article 82 EC.



to attend a particular working group meeting is based on the relevance of the topic for discussion. Working groups therefore consist of NCA officials who volunteer to participate. DG Competition is present in all subgroups and working groups. Each working group currently has around 15 to 18 participating NCAs.

To provide an example of a best practice, the ECN has recently launched an 'ECN Model Leniency Programme' that improves the way in which parallel leniency applications are handled in the ECN. The purpose of this model is to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN.¹¹

Consider when national variations may be justified by the specific nature of national conditions?

In the sphere of competition law there are few issues that are situated at the interface between uniform Community Law and diverse national laws, such as those on procedures and sanctions. Although the Regulation introduces parallel competences between the Commission and the NCAs

The Regulation has established mechanisms to ensure that competition law is applied consistently and efficiently. Pursuant to Article 11(4) of the Regulation, NCAs are thus subject to an obligation to consult the Commission before adopting important decisions (e.g. prohibition and commitments). In practice, they may consult on a draft decision or also on a statement of objections. In addition, the ECN Notice indicates that the Commission is not prevented, obviously for purposes of consistency, from adopting a decision after an NCA decision has been made.¹²

Conclusion

After almost five years of operation, the way the ECN has been functioning so far appears to be very positive. It has certainly gained the support of its members, whose commitment and professional attitude have been of great importance.

Work sharing and the exchange of information contribute to the identification of best practices and also contribute to the effective and efficient solution of clearly pre-defined

key issues of common interest, as in the case of leniency applications, which have proven to be efficient and successful tools in the ECN members' fight against hardcore cartels.¹³

The study has shown that all initial criticism and fears of failure have been effectively tackled. In addition to conducting formal cooperation amongst its members, the ECN's main achievement has been to enhance the strong links between members, either through their joint efforts in the working groups or more informally, by contacting each other. It has been reported to us that, as a result of the creation of the ECN, the gates of communication are now wide open and case handlers from different NCAs across the EU openly discuss, even outside the ECN, both general policy issues and individual cases.¹⁴

Generally, the most important element that has come from the creation of the ECN is a "can do" attitude, and the way it has been embraced by all Member States and the willingness shown by all to attempt to accommodate each

other and to share information when necessary.¹⁵ The ECN has been designed in such a way so as to minimise conflict amongst its members.¹⁶

It must also be pointed out that the Commission retains its managerial role within the ECN, thereby creating a mechanism that aims to tackle legal uncertainty and minimise the risks of inconsistent policy enforcement under decentralisation in the face of a lack of previous strong network experience by the NCAs. The latter's role is not to influence the competition assessment of the Commission in individual cases. On the contrary, taking into account the fact that the Commission is responsible for the coherent implementation of the EC competition rules, the NCAs' objective is to cooperate fully with each other and to exchange opinions and information with the aim of effectively and efficiently applying the competition rules in their respective jurisdictions. By sharing this knowledge, we are certain that a common competition culture in the EU is soon to be established.

NOTES

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¹ OJ 2003 L 1/1.

² White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, 28 April 1999. Press release IP/99/275.

³ Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101/43, 27 April 2004. This Notice replaces the Commission Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 81 and 82 TEC, 15 October 1997.

⁴ Ginevra Bruzzone and Marco Boccaccio, "Taking Care of Modernisation After the Start-up: A View from a Member State", *World Competition* (31)1, 2008. Since the Regulation's entry into force, the Commission has never used the powers entrusted to it under Article 11(6).

⁵ Riley A., "EC Antitrust Modernisation: The Commission Does Very Nicely – Thank You! Part 1: Regulation 1 and the Notification Burden; Part 2: Between the Idea and the Reality: Decentralisation under Regulation 1", 2003 ECLR 24, 604-615 and 657-672.

⁶ Stephen Wilks, "Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?", *Governance: An International Journal of Policy, Administrations and Institutions*, Vol. 18, No. 3, 2005 Blackwell Publishing.

⁷ Phedon Nicolaidis, "Regulatory Integration and Cooperation: The Case of the European Regulatory Group on Electronic Communications", EIPA 2006.

⁸ From 1 May 2004 until 31 December 2008, 978 cases were communicated to the ECN, 164 of which are Commission cases and the rest (814) are cases sent by the NCAs (DG COMP source).

⁹ Kris Dekeyser and Dorothe Dalheimer, "Cooperation within the European Competition Network – taking stock after 10 months of case practice", 2005.

¹⁰ See in this respect the work of the ECN Working Group on Cooperation Issues and the "Results of the questionnaire on the reform of the Member States (MS) national competition laws after EC Regulation No 1/2003" (http://ec.europa.eu/competition/ecn/index_en.html). This study shows the process of approximation of national antitrust legislation to the provisions of the Regulation. This does not imply that such approximation is mandatory in respect of all the provisions of the Regulation.

¹¹ See http://ec.europa.eu/comm/competition/ecn/model_leniency_en.pdf.

¹² Paragraph 57 of the ECN Notice states that "the Commission will normally not – and to the extent that Community interest is not at stake – adopt a decision which is in conflict with a decision of an NCA after proper information pursuant to both Article 11(3) and (4) of the Council Regulation has taken place and the Commission has not made use of Article 11(6) of the Council Regulation" (emphasis added).

¹³ 25 NCAs operate a leniency programme. For more information on the work in the leniency field see Kris Dekeyser and Maria Jaspers, "A New Era of ECN Cooperation: Achievements and Challenges with Special Focus on Work in the Leniency Field", *World Competition*, 2007.

¹⁴ Céline Gauer and Maria Jaspers, "The European Competition Network. Achievements and challenges – a case in point: leniency", *Competition Policy Newsletter*, 1 2006.

¹⁵ "The European Competition Network: What It Is and Where It's going", *The Antitrust Source*, July 2005.

¹⁶ Firat Cengiz, "The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement", EUI Working Papers, MWP 2009/05. See also the Commission's Report on the functioning of Regulation 1/2003, COM(2009) 206 final, 29 April 2009.